Thoreson-McCosh, Inc. and Kevin L. Dunham and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) AFL-CIO and its Local 417. Case 7-UD-547

September 30, 1999

DECISION ON REVIEW AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX, LIEBMAN, HURTGEN, AND BRAME

On March 7, 1997, the Regional Director for Region 7 issued a Decision on Challenged Ballots, Order, Revised Tally of Ballots and Certification of Results of Election. The Union filed a timely Request for Review of the Regional Director's finding that six challenged voters are ineligible to vote under the rationale of Wahl Clipper Corp., 195 NLRB 634 (1972), because they are permanently replaced economic strikers and the election was conducted more than 12 months after the commencement of the economic strike that led to their replacement. In requesting review, the Union urged the Board to overrule the precedent of Wahl Clipper. By Order dated April 1, 1997, the Board granted the Union's request for review. Having considered the matter, including the parties' briefs on review, we have decided, for the reasons stated below, to adhere to the Board's decision in Wahl Clipper and to affirm the Regional Director's Decision on Challenged Ballots, Order, Revised Tally of Ballots and Certification of Results of Election.

The material facts are undisputed. The Union has represented unit employees since 1973. On August 12, 1995, the collective-bargaining agreement covering the unit employees expired, and the Union engaged in an economic strike. Thereafter, the Employer hired permanent replacements. In late April 1996, agreement on a new contract, effective through May 5, 2001, was reached. At the conclusion of the strike, four of the former strikers were reinstated and the remainder were placed on a preferential hiring list. A petition for a union-security deauthorization election was filed on August 21, 1996, and the election was held on November 13, 1996. The tally of ballots shows that 5 were cast for and 4 against deauthorization, with challenges to the ballots of 6 unreinstated former strikers, a sufficient number to affect the election results. The Regional Director found that, under Wahl Clipper, the six challenged former strikers were ineligible to vote because they had not been reinstated by the October 27, 1996 eligibility date, preceding an election scheduled more than 12 months after the commencement of the strike.

In Wahl Clipper, the Board construed Section 9(c)(3) of the Act, as amended in 1959, 1 to preclude perma-

nently replaced former economic strikers from voting in an election held more than 12 months after the commencement of the economic strike. The Board noted that the legislative history of the provision showed that it was adopted as a compromise among various modifications, proposed in both Houses, to replace the existing total prohibition against eligibility for replaced strikers. The Board concluded that the legislative history describing the final compromise reached on Section 9(c)(3) supported the view that the 12-month limitation period was established as a maximum period of voting eligibility for permanently replaced economic strikers.²

With regard to the reference in Section 9(c)(3) to employees "who are not entitled to reinstatement," the Board rejected the view of the dissenting opinion in Wahl Clipper that it qualified the 12-month limitation period. The Wahl Clipper dissent argued that strikers entitled to reinstatement under Laidlaw and having a reasonable expectation of recall should be eligible to vote, and that Section 9(c)(3) did not preclude their eligibility. The Board observed that the dissent relied on the Board's Laidlaw doctrine, which set forth the reinstatement rights of economic strikers, and on the Supreme Court's earlier decision in NLRB v. Fleetwood Trailer, which emphasized the continuing employee status of strikers when they have not obtained regular and substantial equivalent employment. noted that neither Laidlaw nor Fleetwood Trailer was law when Congress amended Section 9(c)(3) in 1959.⁵ The Board found that a review of the congressional debates on the 1959 amendment indicates that Congress

purposes and provisions of this Act in any election conducted within twelve months after the commencement of the strike."

³ Laidlaw Corp., 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

4 389 Ú.S. 375 (1967).

Further, the Board has specifically rejected the contention that Laid-law principles should affect its interpretation of Sec. 9(c)(3). Eck Miller Transportation Corp., 211 NLRB 251, 253 (1974). ("The Laid-law rule is inapplicable here in that it arose in an unfair labor practice context and deals with the entitlement of economic strikers to jobs when they become available; it is not concerned with the voting eligibility of economic strikers, which is governed by Section 9(c)(3) of the Act.") Accord: St. Joe Minerals Corp., 295 NLRB 517, 518 fn. 7 (1987) ("economic strikers' voting eligibility rights are governed by the Board's interpretation of Sec. 9(c)(3) and are independent of reinstatement rights as defined by Laidlaw Corp.").

As noted below, the Congress first reversed the Board's rule regarding the voting eligibility of permanently replaced economic strikers and then modified its own rule. We must assume that the Congress acted with full knowledge of the state of the law as it then existed.

Member Brame additionally relies on *Sutherland, Stat. Const.*, Sec. 49.02 (5th Ed. 1992) ("Where the language of a statute is expressly made applicable to a particular situation or thing . . . subsequent events will not change the scope of the statute's operation.").

¹ Sec. 9 (c)(3) reads as follows: "Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the

² See 195 NLRB at 635, citing the resolution instructing Senate conferees (105 Cong. Rec., Aug. 28, 1959, at 15906) and Representative Griffin's description of the conference agreement on the amendment (105 Cong. Rec., Sept. 9, 10, 1959, at A 8061), and Representative Barden's description of the compromise (105 Cong. Rec., at A 8061).

⁵ 195 NLRB at 695.

operated on the premise that economic strikers had no reinstatement rights at that time.⁶ Thus, the Board construed the 9(c)(3) reference to employees not entitled to reinstatement as a further description of economic strikers, to distinguish them from unfair labor practice strikers.7

The Board further found that even assuming the legislative history was inconclusive, there remain factual and practical questions regarding the extent of the genuine interest of replaced economic strikers in issues which would be determined in the election.⁸ Indeed, according to the Wahl Clipper Board, it was a recognition of the "speculative nature of such interests" that led the Congress to enact the 12-month statutory limitation. In this regard, the Board rejected the contention, now readvanced by the dissent, that the test of "reasonable expectancy of recall in the foreseeable future," applied by the Board to determine the voting eligibility of laid-off employees, should be used to decide the eligibility of replaced strikers. 10 The Board found there was no apt parallel between laid-off employees and replaced economic strikers, in light of the greater contingencies prerequisite to reemployment for economic strikers, who must await not only an improvement in business, but the departure of their replacements.11

For all the foregoing reasons, the Wahl Clipper Board concluded that "the most reasonable course, as well as the most reasonable interpretation of 9(c)(3)," was to hold that permanently replaced economic strikers are not eligible to vote in an election held more than 12 months after an economic strike began.¹² We find that this reasoning, which the Board has applied consistently since 1972, 13 remains sound and that neither the Union nor our dissenting colleagues have presented a convincing argument why we should now abandon it.

Prior to the Taft-Hartley Act, the Board permitted both strikers and their replacements to vote in Boardconducted elections.¹⁴ The Taft-Hartley Act overruled the Board's interpretation and directed that strikers whose jobs had been permanently filled by replacements were ineligible to vote. 15 In contrast, strikers who had not been permanently replaced were not disqualified by the language of Section 9(c)(3) from voting under the Taft-Hartley Act. 16 Moreover, as our dissenting colleagues concede, under Taft-Hartley, permanently replaced economic strikers did not have a right to reinstatement or preferential hiring upon the conclusion of the strike, but were like new hires entitled only to fair consideration for "new employment." Thus, under the Taft-Hartley Act, unreinstated permanently replaced economic strikers were ineligible to vote both during an economic strike (under Sec. 9(c)(3)) and after the strike ended and the strikers offered to return to work (because they had no right to reinstatement under the case law).

In the ensuing 12 years, concern grew that Section 9(c)(3) was being used as a "union busting" device, whereby employers could provoke a strike, hire permanent replacements, encourage the filing of a decertification petition and effectively bar permanent replacements from voting.¹⁸ The 1959 amendments to the Act, accordingly, gave replaced economic strikers "eligibility to vote . . . in any election conducted within the first 12 months of the strike" and thereby eliminated the total disability for all permanently replaced economic strikers. Unreplaced economic strikers remained qualified to vote.20

The 12-month period for replaced economic strikers was based on two concerns: (1) the length of time replaced economic strikers would be vested with the right to vote on an equal basis with replacements and thus

⁶ The Board pointed to an exchange between Senator Javits and Senator Case in the debate on the amendment on April 21, 1959 (105 Cong. Rec., at 5731), contrasting unfair labor practice strikers who were said to have a right of reinstatement with economic strikers.

⁷ 195 NLRB at 635.

⁸ Id. at 635.

⁹ Id. at 635-636. The Board cited the remarks of Senator Lausche in the debate on the 1959 amendment, asserting that individuals with a long absence from the workplace have a lesser interest in a representation election than those who replaced them. (105 Cong. Rec., April 21, 1959 at 5713.)

¹⁰ Id. at 636.

¹¹ Id.

¹³ See, e.g., Carol Cable Co. West, 309 NLRB 326 (1992); K & W Trucking Co., 267 NLRB 68 (1983); Levitz Furniture Co., 248 NLRB 15 (1980); and *Gulf States Paper Corp.*, 219 NLRB 806 (1975). ¹⁴ *Union Mfg. Co.*, 101 NLRB 1028, 1030 (1952).

¹⁵ Id. Sec. 9(c)(3) under the Taft-Hartley Act provided in pertinent part that: "Employees on strike who are not entitled to reinstatement shall not be eligible to vote." The legislative history of the Taft-Hartley Act shows that Congress precluded replaced strikers from voting "[w]ith the intent of preventing two votes from being cast for one job," Union Mfg Co., supra at 1030 (citing S. Rep. No. 105, 80th Cong. 1st Sess at 431):

When elections are conducted during a strike, situations frequently arise wherein the employer has continued to operate his business with replacement workers. If such strike is an economic one and not caused by unfair labor practices of the employer, strikers permanently replaced have no right to reinstatement (NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333). It appears clear that a striker having no right to replacement [sic] should not have a voice in the selection of a bargaining representative and the committee bill so provides.

Union Mfg. Co., supra.

¹⁷ See, e.g., Bartlett-Collins Co., 110 NLRB 395, 397–398 (1954), enfd. sub nom. Flint Glass Workers v. NLRB, 230 F.2d 212 (D.C. Cir. 1956), cert. denied 351 U.S. 988 (1956). Accord: Brown & Root, Inc., 132 NLRB 486, 494 (1961), affd. 311 F.2d 447 (8th Cir. 1963) (rejecting theory that economic strikers entitled to appropriate vacancies as they arose).

See Jeld-Wen of Everett, Inc., 285 NLRB 118, 119 (1987) ("[t]he objective of the 1959 amendment was to eliminate the Taft-Hartley total prohibition against eligibility for replaced economic strikers in representation elections in order to prohibit unfair 'union busting' practices by employers who under Taft-Hartley could precipitate a strike for the purpose of replacing strikers, call for an NLRB election in which the replacements vote against the union, and thus get rid of the union").

¹⁹ W. Wilton Wood, 127 NLRB 1675, 1677 (1960).

²⁰ Gulf States Paper Co., 219 NLRB 806 (1975).

empowered to affect the results of the election; and (2) the factual and practical question of the extent of the genuine interests of replaced economic strikers in the issues which will be determined in the election. Reflecting these concerns, the legislative history indicates that Congress intentionally limited replaced economic strikers' voting eligibility to elections held "during the first 12 months after the commencement of the economic strike." We find no basis for inferring that Congress otherwise changed the eligibility to vote of permanently replaced former economic strikers in 1959, and we note that our dissenting colleagues cite none.

Rather, the legislative history indicates, and the Board has found, that in Section 9(c)(3) Congress intended for voting eligibility purposes to distinguish between economic strikers based on whether they had been permanently replaced. Congress did this by first precluding the eligibility of permanently replaced economic strikers altogether (Taft-Hartley), and then, after 1959, providing for their limited eligibility for the first 12 months after the commencement of the strike (Landrum-Griffin). There is no basis for finding, as the dissent does, that Congress sought to differentiate between economic strikers on the basis of whether they were still on strike or not.²³ No such distinction existed before the Taft-Hartley Act (when the Board enforced no limit on the voting eligibility of economic strikers) or during the period between the Taft-Hartley Act and the 1959 amendments (when permanently replaced economic strikers were made ineligible during the strike and after it had ended, while unreplaced strikers could qualify to vote). We decline to read Section 9(c)(3) in its current form as though such a distinction had existed.

The dissent asserts that our interpretation of Section 9(c)(3) is inconsistent with its "plain meaning." Our dissenting colleagues note that Section 9(c)(3) refers to employees "engaged" in an economic strike, and conclude from this wording that the section's 12-month voting eligibility limitation only applies to employees currently on strike.

The dissent's plain language argument is particularly untenable in light of our colleague's unwillingness to apply a "plain language" reading to those portions of Section 9(c)(3) which, on their face, would **limit** the eligibility of striking employees. In this regard, nothing

in the text of Section 9(c)(3) limits its application to strikers who have been permanently replaced. Read without regard for the legislative history, Section 9(c)(3) would also subject unreplaced strikers to the 12-month limitation on voting eligibility.²⁴ The dissent is unable to point to anything in the text of Section 9(c)(3) to establish that it does not limit the eligibility of unreplaced strikers. That is, Section 9(c)(3) reads in terms of economic strikers "who are not entitled to reinstatement." On its face, the section does not distinguish between replaced economic strikers and unreplaced economic strikers. It is true, of course, that the law at the time was only that replaced economic strikers had no rights of reinstatement. Thus, Section 9(c)(3) applies only to replaced economic strikers. But, that principle must be read into Section 9(c)(3). It is not on the face of Section 9(c)(3). Rather, our dissenting colleagues necessarily resort to the legislative history discussed above to support their position on this point. Under these circumstances, we can discern no justification for the dissent's selective use of its "plain meaning" argument.²⁵

The dissent asserts that former strikers may have a greater interest in election issues than current strikers. We will not engage in speculation as to which group has the greater interest. Rather, we will enforce the Congressional view. In Congress' view at the time, replaced economic strikers had no entitlement to reinstatement and thus had little prospect of rejoining the unit. It was not a matter of striker *interest* in returning. It was a matter of the likelihood of the striker's returning.²⁶ We will enforce that congressional view.

²¹ Jeld-Wen, supra at 119–120.

²² *Jeld-Wen*, supra at 119 (quoting H.R. Conf. Rep. 1147 on S. 1555 (Sept. 3, 1959), 1 Leg. Hist. at 941.

²³ Thus, *un*replaced economic strikers may be eligible to vote in an election held either while they are on strike or subsequently, regardless of whether the Sec. 9(c)(3) 12-month period has elapsed. *Gulf States Paper*, supra. "[G]enerally, an economic striker forfeits such status, for voting purposes, where prior to the election he obtains *permanent* employment elsewhere; or the employer eliminates his job for economic reasons, or discharges, or refuses to reinstate him for misconduct rendering him unsuitable for reemployment." *W. Wilton Wood, Inc.*, supra at 1677 (emphasis in original).

 $^{^{24}}$ As noted above, the Board has ruled that unreplaced strikers are not subject to the 9(c)(3) limitation based on the legislative history of the provisions as amended. See *Gulf States Paper*, supra.

²⁵ In Member Brame's view, the dissent errs in attempting to construe Sec. 9(c)(3) solely on the basis of its text without reference to the legislative history discussed above. In this regard, "[I]t is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers. That principle has particular application in the construction of labor legislation which is to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interest." National Woodwork Manufacturers Assn. v. NLRB, 386 U.S. 612, 619 (1967) (citations and internal quotations omitted). Member Brame believes that this principle applies with particular force in this case because, as noted above, Sec. 9(c)(3) in its current form is an amendment to the Taft-Hartley provision dealing with the voting eligibility of striking employees. Thus, divorcing this provision from its history is entirely inappropriate.

²⁶ The contractual argument espoused by Member Fox in her dissent does not require a different result. The Regional Director rejected that argument on the basis of the Board's decision in *Carol Cable Co. West*, 309 NLRB 326 (1992). We agree with the Regional Director's application of precedent.

In *Carol Cable Co. West*, the Regional Director found that 104 replaced former economic strikers were ineligible to vote in a deauthorization election held more than 1 year after the commencement of the strike. The union had argued that the former strikers were eligible

ORDER

The Regional Director's Decision on Challenged Ballots, Order, Revised Tally of Ballots and Certification of Results of Election is affirmed.

MEMBER FOX, dissenting.

I agree with the dissent in Wahl Clipper Corp., 195 NLRB 634 (1972), and my dissenting colleague here that Section 9(c)(3) of the Act does not preclude permanently replaced former economic strikers from voting in an election conducted more than 12 months after the commencement of the strike. I also agree that eligibility of such former strikers to vote in an election should properly be determined on a case-by-case basis under the same test used to determine whether laid-off employees are eligible to vote, i.e., whether the employee has a reasonable expectancy of reemployment with the employer in the foreseeable future. Accordingly, I join my dissenting colleague in voting to overrule Wahl Clipper and remand the case to the Regional Director to determine whether the six challenged voters had such an expectancy. I write separately only to point out the particular irrationality of extending the rationale of Wahl Clipper to the circumstances of this case and to note how this case illustrates the discriminatory treatment of former strikers under that decision.

The employees whose eligibility is at issue here are former strikers who participated in an 8-month economic strike that ended when the Union and the Employer entered into a new collective-bargaining agreement covering a period from April 1996 through May The parties agreed that unreinstated strikers would be treated under the agreement as employees on layoff and would have the contractual right as laid-off employees to be recalled to job openings pursuant to seniority and the layoff and recall provisions of the agreement. These provisions give laid-off employees recall rights, in accordance with their seniority, to any job they are "capable of performing." Thus, each of the former strikers has not only a Laidlaw right to be reinstated to his former job whenever it becomes available, but also a separate contractual right to be recalled, in

voters because they had reinstatement rights by virtue of a strike settlement agreement between the employer and the union. The Regional Director found no merit in the argument. He concluded that under Wahl Clipper, the 12-month provision is a maximum period of voting eligibility for economic strikers and that only those replaced former economic strikers who are actually reinstated by the eligibility date of the election are eligible to vote. The Board denied the Union's request for review of this decision

We agree with this precedent. The statute sets a maximum period of voting eligibility for replaced current or former economic strikers. No private agreement by the parties can override the statute's requirement and confer voting eligibility where Congress has proscribed it. Replaced current and former economic strikers will be eligible to vote in an election held more than a year after the commencement of the strike only if they have been actually reinstated by the eligibility date of the election.

order of seniority, to a potentially much broader range of jobs with the Employer.¹

There can be no doubt that had the Union or the Employer claimed that any other employee on the contractual recall list was eligible to vote by virtue of his or her recall rights, an inquiry would have been conducted to determine whether the employee had a reasonable expectancy of reemployment under the Board's traditional test for determining whether such employees have a sufficient connection to the unit to render them eligible to vote. See, e.g., Hamilton Watch Co., 188 NLRB 591, 593-594 (1957). However, in this case the Regional Director declined to consider whether the former strikers, by virtue of these same contractual recall rights, would qualify to vote under that test. Rather, relying on Wahl Clipper and Carol Cable Co. West, 309 NLRB 326 (1992), a decision reaffirmed by the majority today, the Regional Director ruled that as unreinstated former economic strikers they were barred from voting by Section 9(c)(3), and that any rights they may have had to reemployment were irrelevant. This is surely turning the language and history of Section 9(c)(3) on its head.

Section 9(c)(3) by its terms addresses the voting rights of "employees engaged in an economic strike who are not entitled to reinstatement"; it provides that such employees shall have the right to vote in any Boardconducted election within 12 months after the commencement of the strike. The legislative history reflects, and the majority does not dispute, that it was enacted in its present form by Congress in 1959 in order to create voting rights for this class of employees who, under the then-existing version of Section 9(c)(3), could not vote at all in a Board election. Yet through a tortured reading of the statutory language and a refusal to take into account Supreme Court and Board decisions defining the rights of economic strikers, the Board has managed to interpret the 9(c)(3) grant of voting rights as an absolute prohibition against any unreinstated economic striker being allowed to vote in an election held *more* than 12 months after the commencement of the strike, even if the employee is *not* engaged in a strike and is entitled to reinstatement.

As Member Fanning's dissent in *Wahl Clipper* and my colleague's dissent in this case forcefully argue, it is bad enough that the majority has refused to construe Section 9(c)(3) in light of Supreme Court and Board cases which made clear that former economic strikers who have not obtained regular and substantially equiva-

Although the Regional Director stated in his decision that the Union "does not contend that the former strikers' contractual rights are any greater than their statutory [recall] rights," this is clearly an error. The contractual right to be recalled to any available job the employee is "capable of performing" is on its face broader than the *Laidlaw* right to reinstatement to one's former job, and depending on the particular employee's seniority, could substantially increase the employee's likelihood of reemployment in the forseeable future.

lent employment and who have made an unconditional offer to return to work retain their employee status under the Act and are entitled to reinstatement upon the departure of their replacements, in particular *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967); and *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970). But it is, if anything, even more irrational to refuse to give effect not only to the *Laidlaw* rights of former strikers but also to contractual reinstatement rights that they share with other employees who may be eligible to vote by virtue of those rights.

Suppose, for example, that a former striker and a laid-off employee both formerly worked in the same department, doing essentially the same job using the same set of skills. Both are on the recall list, but the former striker has greater seniority and is higher on the list. Suppose, in addition, that the employer's production plans are such that it is highly likely that both will be recalled within the next few months, although the former striker by virtue of his seniority will be recalled sooner than the other employee. Under the majority's reading of Section 9(c)(3), the former striker cannot vote, even though the laid-off employee is eligible.

What legitimate rationale can there be for such a result? In Wahl Clipper, the majority rejected the claim that former strikers should be treated like laid-off employees by virtue of their *Laidlaw* rights on grounds that it was much more speculative that a replaced striker would be hired than that a laid-off employee would be recalled. Because "the replaced economic striker must await not merely an improvement in the business of his employer but also the termination of employment of his replacement," the parallel with laid-off employees "is not entirely apt," the majority asserted. In the circumstances here, however, the majority's position lacks even that weak reed to support it. The former striker's position is not just parallel but identical to that of the laid-off employee. All that is different is that the former striker got in the position he is in by exercising his statutorily protected right to strike.

As my dissenting colleague points out, Congress amended Section 9(c)(3) in 1959 because it wished to protect and strengthen the right to strike. Ironically, however, the majority's interpretation of Section 9(c)(3) has the effect here of discriminating between unreinstated strikers and other former employees waiting reemployment on no ground other than the fact that they have engaged in a strike. Such a result is contrary to the basic principles of the Act.

I would find, therefore, that the 12-month limitation of Section 9(c)(3) does not apply to permanently replaced former economic strikers who are entitled to reinstatement. Like my dissenting colleague, I agree that the eligibility of unreinstated strikers should be determined under the same test that is used to determine

whether laid-off employees are eligible to vote. Accordingly, I would overrule both *Wahl Clipper* and *Carol Cable*.

MEMBER LIEBMAN, dissenting.

The Board's decision in *Wahl Clipper* is contrary to the plain words of Section 9(c)(3) and in conflict with subsequent law regarding the reinstatement rights of permanently replaced former economic strikers. Yet today my colleagues in the majority refuse to abandon this precedent. Their action results in the continuing diminishment of the statutory right to strike—a right that Congress sought to protect in enacting the 1959 amendments. I dissent.

The Plain Language of Section 9(c)(3) Does Not Apply to Former Economic Strikers

Section 9(c)(3) refers to "employees *engaged* in an economic strike." (Emphasis added.) The plain meaning of this reference is that the section covers employees who engage in a strike during the 12 months before the election and are still on strike at the time of the election. On its face, the section does not address the eligibility of former economic strikers.

A review of the legislative history of the 1959 amendments supports this interpretation. The history shows that Congress was concerned not only with preventing the "union busting" that had occurred under the Taft-Hartley version of Section 9(c)(3), but also with protecting employees' right to strike. In a floor discussion between Senator Case and Senator Javits, Senator Case supported the proposed Senate amendment, which gave voting rights to economic strikers, but was concerned that there was no time limit on eligibility. He stated:

I think we can agree-at least I agree-that if we deny the right to vote to the economic strikers, we effectually defeat the right to strike. I believe everyone would have to admit that if one loses his right to vote by engaging in a concerted stoppage of work, the right to strike has been effectively curtailed, crippled, and defeated. We have recognized the right to strike. The act itself provides that that right shall be preserved; and we should not permit it to be defeated. However, I think the time within which

¹ The statutory language refers to active strikers and not to former strikers who have abandoned the strike and applied for reinstatement.

Sec. 9(c)(3) had its origins in the 1947 Labor Management Relations Act's amendments; the relevant part reads: "Employees on strike who are not entitled to reinstatement shall not be eligible to vote."

The 1959 Labor Management Reporting and Disclosure Act amendment to Sec. 9(c)(3), the current law, which largely repealed the 1947 version reads: "Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act in any election conducted within twelve months after the commencement of a strike."

the right to vote may be exercised is a substantive matter." [2 L.H. 1065.]²

It stands to reason that an interest in protecting the right to strike, in the context of representation elections, chiefly pertains to those who actively are on strike at the time their eligibility is questioned, rather than to those who are no longer on strike. Indeed, there is specific support in the legislative history for this view. In response to Senator Lausche's concerns about the absence of any time limits in the Senate's proposed amendment, Senator Javits stated:

I respectfully submit, as a matter of judgment, based upon all aspects of the question, that we can go ahead and enact such a provision now, even though we may reach the point, on the basis of technical advice, when we shall wish to establish a limit, as a protection, on the time within which an economic striker may be on strike and nevertheless vote. [Emphasis added.] [2 L.H. 1065.]

Senator Kennedy similarly indicated that the amendment was addressed to economic strikers who were on strike at the time of the election. He stated:

Our purpose is to permit economic strikers to vote while there is a lawful strike in progress, a strike for a reasonable and proper purpose, and to permit the Board to adopt a rule of reason in making a judgment as to when it would be wise to terminate the right. [2 L.H. 1138.]

By contrast, there is no reference in the legislative history to former economic strikers. For all of these reasons, I conclude that Congress meant what it said when it enacted Section 9(c)(3) using the words, "employees engaged in an economic strike." It meant to address only the eligibility of permanently replaced economic strikers who are still on strike at the time of the election.

The majority's argument to the contrary is not persuasive. The majority asserts that the legislative history indicates, and the Board has found, that in Section 9(c)(3) Congress intended for voting eligibility purposes to distinguish between economic strikers based on whether they had been permanently replaced. The majority concludes, therefore, that there is no basis for finding that Congress sought to differentiate between strikers on the basis of whether they were still on strike. In support of this reasoning, the majority cites *Gulf States Paper*, 219 NLRB 806 (1975). There, the Board held that Section 9(c)(3) places no restriction on the voting eligibility of unreplaced economic strikers. Thus, 35 unreplaced economic strikers who were still on strike

were found eligible to vote in an election held more than 12 months after the strike began.

The legislative history and case law cited by the majority are accurate. However, they do not support the majority position. I agree that the legislative history indicates that Congress intended to address the eligibility only of permanently replaced economic strikers in Section 9(c)(3). The eligibility of unreplaced economic strikers has never been questioned. They remained eligible to vote under the Wagner Act,³ the Taft-Hartley Act,⁴ and the 1959 amendments.⁵ For this reason, *Gulf States Paper* is correctly decided. The *Wahl Clipper* construction of Section 9(c)(3) simply does not apply to unreplaced economic strikers, regardless of whether they are still on strike.

Similarly, the intent to address in Section 9(c)(3) only the eligibility of permanently replaced economic strikers has no bearing on the conclusion that the section does not apply to permanently replaced economic strikers who are no longer on strike. A decision to address only one class of employees does not exclude a decision to make distinctions within that class. That Congress addressed only the class of permanently replaced economic strikers, therefore, does not preclude a finding that Congress intended to distinguish between members of that class on the basis of whether they were still on strike, when it used the words, "employees engaged in an economic strike."

I believe that this interpretation of Section 9(c)(3) accords with a major reason for the 12-month period in Section 9(c)(3), which was, as the majority asserts, a concern for the extent of the genuine interests of replaced economic strikers in the issues which will be determined in the election. The replaced economic striker who remains actively on strike at the time of an election conducted more than 12 months after the strike began may have a more attenuated interest in the issues to be determined in the election, than will a replaced economic striker who is no longer on strike. In the case of the active economic striker, the striker is still not ready to return to the workplace and one may question how long the striker should remain in that status and still be able to affect the results of the election. This is the precise question that the 12-month period in Section 9(c)(3) addresses.

In the case of the former economic striker, however, the former striker is prepared to return to work and is prevented from doing so because his or her job has been filled by a permanent replacement. The former striker's

² See also Senator Case's remarks to Senator Kennedy at 1 L.H. 1138 and Senator Dirksen's remarks at 2. L.H. 1074.

³ Columbia Pictures Corp., 64 NLRB 490 (1945).

⁴ Union Mfg Co., 101 NLRB 1028 (1952).

⁵ Gulf States Paper, supra. Such unreplaced strikers retain their employee status if they have not secured permanent employment in another job, if the employer has not lawfully discharged or refused to reinstate them, and if the strike does not contravene the statute. Union Mfg. Co., supra.

interest in election issues is virtually identical to that of a laid-off employee who is prepared to return to his or her job but is prevented from doing so by lack of work.

The Board's test of reasonable expectancy of reinstatement/recall in the foreseeable future ensures that former economic strikers and laid-off employees have a genuine interest in election issues. The 12-month limitation in Section 9(c)(3), on the other hand, ensures that active permanently replaced economic strikers have a genuine interest in election issues. The language and the purpose of Section 9(c)(3), therefore, support the view that Congress intended to distinguish between former and active replaced economic strikers.

The Plain Language of Section 9(c)(3) Does Not Apply to Former Replaced Economic Strikers with Reinstatement Rights Under Laidlaw

The dissenting opinion in *Wahl Clipper*, authored by Member Fanning, argued that Section 9(c)(3) should be construed in light of Supreme Court and Board cases issuing after the 1959 amendments which clarified the rights of employees who abandoned an economic strike. He pointed to the Supreme Court's decision in *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967), stressing the continuing employee status of strikers under Section 2(3), when they have not obtained regular and substantial equivalent employment. He also relied on the Board's decision in *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970), which held:

[E]conomic strikers who unconditionally apply for reinstatement at a time when their positions are filled by permanent replacements: (1) remain employees; (2) are entitled to full reinstatement upon the departure of replacements unless they have in the meantime acquired regular and substantially equivalent employment, or the employer can sustain his burden of proof that the failure to offer full reinstatement was for legitimate and substantial business reasons.

Under the rationale of these decisions, Member Fanning found that the definition of coverage in Section 9(c)(3) did not apply to former strikers whose employee status under the Act continues and who are entitled to reinstatement under *Laidlaw*. He concluded that it was appropriate to treat such former strikers in a manner similar to laid-off employees and to find them eligible to vote if they had a reasonable expectancy of reinstatement within the foreseeable future.

I agree with Member Fanning's reasoning. At the time of Section 9(c)(3)'s enactment, permanently replaced former economic strikers were not entitled to reinstatement but were entitled only to be considered fairly for reinstatement. See, e.g., *Bartlett-Collins Co.*, 110 NLRB 395 (1954), enfd. sub nom. *Flint Glass*

Workers v._NLRB, 230 F.2d. 212 (D.C. Cir. 1956), cert. denied 351 U.S. 988 (1956). The Supreme Court's decision in Fleetwood Trailer and the Board's decision in Laidlaw make it clear that former economic strikers who have not obtained regular and substantially equivalent employment retain their employee status under the Act and are entitled to reinstatement on the departure of their permanent replacements if they have unconditionally offered to return to work. The changes made in the Fleetwood and Laidlaw decisions to overrule then extant precedent and to give economic strikers a right to reinstatement did not affect the voting rights of active economic strikers, which remain governed by Section 9(c)(3), but they had repercussions on the voting rights of former economic strikers. The 9(c)(3) reference to employees "who are not entitled to reinstatement," when viewed in the context of these decisions, does not cover former economic strikers with Laidlaw reinstatement rights. Thus, I agree with Member Fanning's dissenting opinion that Fleetwood and Laidlaw affected the voting rights of permanently replaced former strikers and requires that the Board find them eligible to vote if they have a reasonable expectancy of reinstatement in the near future.

The *Fleetwood* and *Laidlaw* decisions are as vital today as they were 26 years ago when *Wahl Clipper* issued. That they issued after the 1959 amendment does not require a different result. There is nothing in the legislative history of the amendment that dictates a finding that the language "not entitled to reinstatement" was used only as a means of distinguishing economic strikers from unfair labor practice strikers.

Furthermore, application of the Fleetwood and Laidlaw decisions to Section 9(c)(3) accords with the overall interest in the statutory right to strike expressed in the legislative history of the 1959 amendments. It is beyond question that the Fleetwood and Laidlaw decisions expanded the rights of permanently replaced former economic strikers by guaranteeing their continuing employee status and granting them reinstatement rights. Insisting, as the majority does, that these decisions cannot be applied to Section 9(c)(3), when the section has words to which they clearly can be applied, undercuts the rights established by the decisions. It also ultimately diminishes the right to strike. Thus, an employee who has been permanently replaced after exercising the right to engage in an economic strike, and has subsequently gained a right to reinstatement by making an unconditional offer to return to work, will nevertheless be disenfranchised if the election occurs more than 12 months after the strike began. This curtailment of rights will occur even if it is established that the employee had a reasonable expectancy of reinstatement in the foreseeable future.

I do not believe that Section 9(c)(3) should be read in a manner that conflicts with subsequent decisions expanding the rights of economic strikers, when the panding the rights of economic strikers, when the plain language of the section is in harmony with such decisions. There is nothing in the legislative history dictating that only the 1959 law on reinstatement rights of permanently replaced former economic strikers applies

to the 9(c)(3) language "not entitled to reinstatement." In the absence of such a dictate, I find that the section is best construed by looking both to the plain meaning of its words and to the body of law concerning the rights of former economic strikers.